# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 3, 2006 |
| v | No. 261379<br>Macomb Circuit Court |
| JAMES WILLIAM VARNER,<br><br>Defendant-Appellant. | LC No. 04-003900-FH |

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a(2), assault with the intent to commit a felony, MCL 750.87, and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 30 years imprisonment for the first-degree home invasion conviction, 6 to 30 years imprisonment for the assault with the intent to commit a felony conviction, and 2 to 15 years imprisonment for the resisting and obstructing a police officer conviction. We affirm.

Defendant's first issue on appeal is whether sufficient evidence was presented to bind him over for trial for home invasion and assault or to convict him of those charges. "'A circuit court's decision to grant or deny a motion to quash charges is reviewed de novo to determine if the district court abused its discretion in binding over a defendant for trial.'" *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002), quoting *People v Jenkins*, 244 Mich App 1, 14; 624 NW2d 457 (2000). An abuse of discretion occurs if an unbiased person, considering the facts on which the trial court based its decision, would find no justification for the ruling made. *People v Clement*, 254 Mich App 387, 389; 657 NW2d 172 (2002).

The district court must bind over a defendant if the evidence presented at the preliminary examination establishes that a felony has been committed and there is probable cause to believe that the defendant committed the crime. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Circumstantial evidence, coupled with those inferences arising therefrom, is sufficient to establish probable cause to believe that the defendant committed a felony. *Id.* The prosecution is not required to prove each element of the crime beyond a reasonable doubt. Where there is credible evidence to both support and to negate the existence of an element of the crime, a factual question exists that should be left open to the jury. *Terry*, *supra* at 451.

In reviewing the sufficiency of the evidence at trial, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

A defendant may be convicted of first-degree home invasion if he (1) enters a dwelling without permission, (2) with the intent to commit a felony, larceny, or assault in the dwelling, (3) while another person is lawfully present in the dwelling. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). The unexplained possession of recently stolen property, unaccompanied by other facts or circumstances indicating guilt, will not sustain a conviction for breaking and entering,[1] but it is some evidence that the possessor is guilty of theft. *People v Benvides*, 71 Mich App 168, 174-175; 247 NW2d 341 (1976).

The elements of the crime of assault with the intent to commit a felony are set forth in MCL 750.87. *People v Strand*, 213 Mich App 100, 102; 539 NW2d 739 (1995). MCL 750.87 provides:

> Any person who shall assault another, with intent to commit any burglary, or any other felony, the punishment of which assault is not otherwise prescribed, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.

MCL 750.87 requires a specific intent to commit the predicate felony. *Strand, supra* at 102.

In this case, defendant neither disputes that the intruder in the victims' home was guilty of first-degree home invasion, nor that the person guilty of the home invasion is also guilty of the assault with the intent to commit a felony. Defendant simply challenges the evidence suggesting that he was the intruder.

The evidence presented at trial and at the preliminary examination was generally the same. An intruder entered the victims' home and stole several personal items. One victim called the police one minute after the intruder left. The first police officer arrived at the victims' home within three minutes of the call to the police. That first officer stayed at the victims' house for about a minute to a minute and a half before leaving. Three to five minutes after leaving the victims' house, the police officer observed defendant walking southbound on Gratiot. Defendant started to run as soon as the police spotted him. Defendant was ultimately arrested and found to be in possession of numerous items taken from the victims' home.

While the unexplained possession of recently stolen property, unaccompanied by other facts or circumstances indicating guilt, will not sustain a conviction for home invasion, there

[1] The home invasion offenses, MCL 750.110a, entail conduct covered by the former offense of breaking and entering a dwelling. *People v Warren*, 228 Mich App 336, 347-348; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000).

were other facts or circumstances indicating guilt in this case. Defendant was observed a block away from the victims' home prior to the home invasion and three or four blocks away shortly after the home invasion. The evidence also indicated that defendant's possession of the stolen property was in relatively close time to the home invasion. In total, only 8 to 10 ½ minutes passed after the intruder left before defendant was discovered with the victims' property. Additionally, evidence of defendant's flight upon being observed by the police is admissible to support an inference of "consciousness of guilt." *People Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Viewing the totality of the evidence, we conclude that the district court did not abuse its discretion in binding defendant over for trial because the evidence presented at the preliminary examination established that the felonies had been committed and there was probable cause to believe that the defendant committed them. Deferring to the trial court's superior position to judge witness credibility and viewing the evidence in a light most favorable to the prosecution, we also conclude that sufficient evidence was presented to support the finding that defendant was the intruder who committed first-degree home invasion and assault with the intent to commit a felony.

Defendant's second issue on appeal is whether the trial court lacked venue to try the resisting and obstructing charge. "'A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de novo.'" *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004), quoting *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996).

Venue is part of every criminal prosecution and must be proven by the prosecutor beyond a reasonable doubt. *Webbs, supra* at 533. "'Due process requires that the trial of criminal prosecutions should be by a jury of the county or city where the offense was committed, except as otherwise provided by the Legislature.'" *Webbs, supra* at 533, quoting *Fisher, supra* at 145. One exception provided by the Legislature is found in MCL 762.3(1), which provides: "Any offense committed on the boundary line of 2 counties or within one mile of the dividing line between them, may be alleged in the indictment to have been committed, and may be prosecuted and punished in either county."

In this case, the record reflects that defendant's arrest for resisting and obstructing a police officer occurred in the city of Detroit, which is in Wayne County. The record also reflects, however, that the arrest occurred within one mile of the boundary between Wayne County and Macomb County. Defendant did not dispute below, nor does he dispute on appeal, that the arrest occurred within one mile of the boundary between the two counties. Consequently, venue was proper in either Wayne County or Macomb County and the trial court had jurisdiction to try the resisting and obstructing charge.

Defendant's third issue on appeal is whether he is entitled to resentencing because the enhancement of defendant's sentence based on facts not proven at trial represents an unconstitutional violation of defendant's Sixth Amendment right to a jury trial under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). This issue was not raised at sentencing by defense counsel and is, therefore, unpreserved for appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). This Court reviews unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d (1999). To avoid forfeiture under the plain error rule, three

requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Carines, supra* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Carines, supra* at 763. Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 765.

Defendant argues on appeal that, because the prosecutor did not prove the facts underlying the scoring of his guidelines during trial, the enhancement of his sentence represents an unconstitutional violation of his Sixth Amendment right to a jury trial under *Blakely, supra*. Our Supreme Court, however, has recently concluded that Michigan's sentencing scheme does not offend the Sixth Amendment on the basis that its sentences are based on facts not determined by a jury beyond a reasonable doubt. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). "As long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164. Consequently, there was no plain error affecting defendant's substantial rights in his sentencing.

Defendant's fourth issue on appeal is whether the trial court erred in not using his proposed jury instruction. This Court reviews de novo a defendant's claim of instructional error. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). A defendant's request for a jury instruction on a theory or defense must be granted if supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). If the applicable instruction is not given, however, reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative. *Riddle, supra* at 124-125.

Defendant's proposed instruction stated: "Unexplained possession of recently stolen property will not support a conviction for breaking and entering or home invasion." Defendant's instruction fails to state, though, that unexplained possession of recently stolen property may be evidence of a home invasion or that, accompanied by other facts and circumstances indicating guilt, it may sustain a conviction for home invasion. Because defendant's proposed instruction was an incomplete statement of the relevant law, the trial court is not obligated to give the instruction verbatim. *People v Ritsema*, 105 Mich App 602, 609; 307 NW2d 380 (1981).

Should the trial court have instructed the jury on the significance of unexplained possession of recently stolen property because it is applicable to this case, the outcome of the trial in this case would nevertheless have been the same. In addition to the unexplained possession of the recently stolen property, there were ample facts and circumstances indicating defendant's guilt (as discussed above). On the basis of the evidence against defendant, we conclude that even if the instruction should have been given, reversal is not required because the error is not outcome determinative.

Defendant's fifth issue on appeal is whether the prosecutor committed misconduct during closing arguments. Defendant failed to object to the alleged instances of prosecutorial impropriety in this case so review is for plain error. *Aldrich, supra* at 110.

On this issue, defendant argues that the prosecutor misstated the evidence in his closing argument. Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The prosecutor need not confine argument to the blandest of all possible terms and has wide latitude to argue all reasonable inferences from the evidence. *Aldrich, supra* at 112.

Contrary to what defendant argues on appeal, the prosecutor did not repeat the same argument three times and only one of the disputed remarks misstated the evidence. The prosecutor stated in closing argument that defendant was caught with the victims' property within six to ten minutes after leaving their home. The prosecutor is free to argue that defendant was the intruder, but the evidence suggests that defendant was located 8 to 10 ½ minutes after he left the house. Assuming this minor discrepancy was clear error, as explained in *Carines, supra*, defendant must also show that the clear error prejudiced him by affecting the outcome of the lower court proceedings. Id. at 763. On the basis of the evidence against defendant discussed above, in addition to the trial court's instruction that the attorneys' comments were not evidence, we conclude that defendant cannot demonstrate that one minor misstatement by the prosecution prejudiced him.

Defendant also challenges an experiment conducted by the prosecutor during closing argument. The prosecution argues, however, that the experiment was proper because it responded to an argument raised by defendant and illustrated the evidence presented at trial. A prosecutor's comments must be considered in light of defense arguments. *People v Knowles*, 256 Mich App 53, 61; 662 NW2d 824 (2003). Improper prosecutorial comments do not warrant reversal when responsive to otherwise off-limits issues brought into the case by the defense. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003).

The use of blackboards, charts, and other visual aids at a trial are common practice. *Campbell v Menze Constr Co*, 15 Mich App 407, 409; 166 NW2d 624 (1968). The extent to which visual aids can be used and any comment to be made by final instructions that such visual aids are not evidence rests within the sound discretion of the trial court. *People v Ng*, 156 Mich App 779, 787; 402 NW2d 500 (1986); *Campbell, supra* at 409.

In this case, the experiment was conducted during closing argument after both sides rested, and accordingly, was not evidence. In addition, the trial court instructed the jury that the arguments of the lawyers were not evidence. Moreover, defendant does not contest the fact that the flashlight and jacket used in the experiment were properly admitted into evidence. Exhibits which have been admitted into evidence may be displayed to the jury and referred to by the prosecutor during closing argument. *People v Mundy*, 63 Mich App 606, 608; 234 NW2d 663 (1975). Historically, all materials admitted into evidence compose an integral and absolutely necessary part of the case, and both the prosecution and defendant have an absolute right to use any and all such evidence in closing argument. *Mundy, supra* at 608. Given their admission,

and on the basis of the record, we conclude that it was not clear error for the prosecutor to use the flashlight and jacket during closing argument.

Even if the experiment were clear error, defendant would also have to show that the clear error prejudiced him by affecting the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Carines*, *supra* at 763. The experiment did strengthen the victim's testimony, but her eyewitness testimony was never the crux of the prosecution's case. On the basis of the evidence against defendant discussed above, we conclude that defendant cannot demonstrate the experiment prejudiced him.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto